No. 22597

In the

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

L. B. Foster Company, Inc., *Appellant,*

vs.

Melvin Hurnblad and Grace Hurnblad, his wife, *Appellees.*

Sim Knight; L. B. McGowan; Transport Supply Co., a corporation; Nelson Iron Works, Inc., a corporation; and David Paul's Eastport Dodge, Inc., *Defendants.*

Appeal from the United States District Court for the Western District of Washington, Southern Division

APPELLEES' ANSWERING BRIEF

Comfort, Dolack, Hansler & Billett,
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Tacoma, Washington 98405

MAR-LO COMPANY PRINTERS, TACOMA

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APPELLEES' ANSWERING BRIEF

STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

Appellees, Melvin R. Hurnblad and Grace M. Hurnblad, are husband and wife and were injured in a truck-auto collision that occurred on December 9, 1963, at Tacoma, Washington. The appellees filed this action in the Superior Court for Pierce County, Washington, where they reside, alleging liability in

excess of $10,000 on the part of defendants Sim Knight, L. B. McGowan and Transport Supply Company, all residents of Oregon, and Nelson Iron Works, Inc., a Washington corporation, for negligent acts and omissions. Thereafter by appellees' amended complaint appellant L. B. Foster Company, Inc., a Pennsylvania corporation, and additional defendant David Paul's Eastport Dodge, Inc., another Oregon resident, were named parties on the basis of alleged negligence. When appellees nonsuited defendant Nelson Iron Works, Inc., the only defendant residing in Washington, appellant and other defendants caused the removal of the case to the District Court for the Western District of Washington, Southern Division, under 28 U.S.C.A., §§ 1441-1446, that court having jurisdiction by virtue of 28 U.S.C.A., § 1332. (R. 1-30.)

Defendant Transport Supply Co. failed to answer and was defaulted (R. 186-187). Defendants Sim Knight, L. B. McGowan and David Paul's Eastport Dodge and appellant answered and denied negligence (R. 1-35). Upon trial to a jury, a $75,000 verdict was returned for appellees against defendants Sim Knight, L. B. McGowan and appellant. (R. 176-177.) After the entry of judgment and the denial of its new trial motion, appellant gave notice of appeal herein (R. 181-190). Defendants Sim Knight and L. B. McGowan did not appeal. Jurisdiction of the appeal is vested in this court by 28 U.S.C.A., § 1291.

STATEMENT OF THE CASE

1. Introduction

> . . . A fair statement of the evidence is all that is required for the record on appeal, but the appellant should use good faith to make such statement a full and fair one, so that the burden is not cast upon the court or appellees to make a new one.[1]

Appellees can not accept or admit appellant's statement as full, fair or correct. A new statement of the case is compelled.

2. Stipulated Facts

Agreed facts set forth in the pretrial order show appellees are Pierce County residents who were proceeding in their 1961 Ford station wagon in an easterly direction on South 25th Street, Tacoma, on December 9, 1963. Appellee Melvin R. Hurnblad was driving and his wife was sitting in the right front passenger seat. At approximately 8:05 in the morning appellees' automobile entered the Pacific Avenue intersection, which is controlled by a standard overhead red and green traffic signal. Midway through the intersection appellees were seriously injured when their automobile was struck on the right side by a 1945 Peterbilt tractor, pulling a 1945 Pointer Willamette trailer and headed north on Pacific Avenue. The combined truck was 40 feet in length. It was driven by defendant Sim Knight, a co-purchaser with defendant L. B. McGowan. They bought the truck on contract

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[1] *Phillips v. The Governor & Co.* (C.A. 9), 79 F. 2d 971, 975 (1935); 27 USPQ 229.

from defendant David Paul's Eastport Dodge, Inc., a predecessor in interest of Dodge City, Inc. (R. 112-135.)

At the time of the accident the truck was carrying a load of appellant's steel from San Leandro, California, to Seattle, Washington.[2] Appellant placed the shipment order with defendant Transport Supply Company. Appellant agrees the hauling rate it paid was but $0.75 per hundredweight. (R. 112-114.)

3. Proved Facts

Appellant would have this court believe

> . . . there was no evidence concerning whether Transport Supply had the necessary (Interstate Commerce Commission) licenses and permits. (App. Br. 38.)

Exhibit 12D is an Interstate Commerce Commission[3] certification that defendants Sim Knight, L. B. McGowan and Transport Supply Company have never been licensed or authorized to engage as a common carrier in interstate commerce. Exhibit 12D was admitted into evidence when appellant indicated no objection except as to relevancy. (Tr. 940-941.) In addition to Exhibit 12D, there is testimony from which this court can only conclude that defendants Sim Knight, L. B. McGowan and Transport Supply Company had no federal authority when appellees were injured (Tr. 429-430). Nor did any defendant have authority to transport appellant's steel intrastate (Exs. 12B & 12C; Tr. 341-342, 429-430).

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[2] The load consisted of 35,000 pounds of rails and 562 pounds of splice bars (Ex. 5A).

[3] Hereafter called the I.C.C.

As previously indicated, the parties stipulated appellant contracted to ship its steel from California to Washington via defendant Transport Supply Company, an unlicensed carrier, for $0.75 per hundredweight (R. 112-115). This rate was unlawful, far below the lawful charge of any legitimate interstate carrier (Tr. 23-27, 272-286). Felix Baker, appellant's salesman who arranged the deal with defendant Transport Supply Company, admitted knowing the lawful rate was at least $1.00 per hundredweight (Tr. 509, 536-537).[4] The major significance of appellees' proof that appellant shipped its steel with an illegal carrier at a cut-rate price is found in the testimony of Frank E. Landsburg, who for 27 years was an employee of the I.C.C. He retired in 1962 as I.C.C. regional manager and district director for the states of Idaho, Washington and Oregon, and now continues as a trucking consultant and safety and traffic expert (Tr. 640-641). Mr. Landsburg testified:

> Q. (Mr. Hulscher): Now, the question is, sir, what was the common knowledge among these people (shippers) concerning unregulated and uncertified carriers?
>
> A. Well, generally speaking, people in the shipping industry, for instance, certainly those in the regulatory industry, knew these people were operating illegally on the highway, and they knew too that if they risk becoming a party to a con-

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[4] He also admitted general knowledge as to the existence of unlawful carriers:

> THE COURT: You were aware that there were such (unlicensed, unregulated carriers) in 1963 when you made this transaction?
>
> THE WITNESS: I would say yes, that I was aware there were people of that type. (Tr. 536.)

spiracy to violate the law or they aided or abetted these people in their violation, they would be liable to criminal prosecution in the federal courts, they knew that, common knowledge.

Q. What common knowledge did they have of the activities of the unregulated and uncertified carriers operating in interstate commerce?

A. Well, I would say they had complete knowledge. (Tr. 646-647.)

. . . . .

THE COURT: What relation, if any does this (rate concession by unauthorized carriers) have to safety on the highway?

THE WITNESS: Very well, now, lets take the unlawful operator.

(Mr. Hulscher) Alright. Go ahead.

A. In order to make a deal with the shipper and prevail upon the shipper to risk the possibility of being a party to the criminal action in the courts, this unlawful operator had to make a substantial reduction in the published rates of the common carriers in order to get the shipper to take that risk. Therefore, he did not have the money, because of his drastically reduced income, to properly maintain his truck in a safe operating condition. He found it necessary to violate practically every pertinent section of this Interstate Commerce Act in order to stay on the highway. (Tr. 648-649.)

Of importance, too, is the testimony of Jack L. Stewart of the Willamette Traffic Bureau, an agency which represents legitimate, irregular route motor carriers before the I.C.C. and publishes their rates. Willamette Traffic Bureau has a file on every known carrier on the Pacific Coast. (Tr. 267-268.) Mr. Stewart stated

there are persons active in the illegal transportation of goods, known as gray area operators, who charge less than lawful rates. These unlawful carriers are not in business any length of time. Their rates are so low they have no money to spend on proper maintenance and renewal of equipment. Even if they start operating with safe equipment, it soon becomes dangerous. The problem exists throughout the United States. (Tr. 274-275.)

Returning to the testimony of Mr. Landsburg, he elaborated further:

> (By Mr. Hulscher) May I interrupt for just a moment. These things that you have just referred to, were these things common knowledge among shippers, carriers, and regulatory agencies that were involved in interstate commerce in 1963?
>
> A. It is well known because these people ultimately go broke and they leave sometimes bloody accidents and unpaid bills, and it was an economic loss, and it was known by everybody.
>
> Q. This is again known in 1963?
>
> A. Oh, yes.
>
> Q. Now, was there any general knowledge — maybe you have answered this, but I will ask it to see, was there general knowledge in the industry among shippers, carriers, and regulatory agencies concerning the maintenance on equipment operated by non-certified and/or unregulated carriers in interstate commerce in 1963?
>
> A. Yes, sir, it was common knowledge.
>
> Q. What was that?
>
> A. Borne out by our road checks.
>
> Q. What was that knowledge, sir?

> A. Well, that knowledge was that their equipment was usually in very bad condition, and in the majority of cases, it was unsafe for operation on the highway.
>
> Q. From your experience in this field, do you know why the equipment of the uncertified and unregulated carrier was generally run down?
>
> A. They didn't have the money to pay the repair bills. They had cut the rates drastically, the income was below their costs, most of them were usually ignorant people, and they didn't have any business idea what their costs actually were. (Tr. 650-651.)

It is clear appellant employed an unauthorized carrier at a cut-rate to carry appellant's mine rails to the state of Washington (Exs. 5A, 5B, 12B; R. 112-115; Tr. 20-32, 267-290). And what is in the record about the quality of the trucking equipment of appellant's unlicensed carrier? The tractor-trailer rig was more than 18 years of age (R. 114). It appeared to be old and rundown (Tr. 111, 209-214, 700). A trucker witness described the tag axle as among the oldest he has ever seen (Tr. 225). The paint job evidenced a large splice in the midsection of the trailer (Tr. 111-112). Neither the tractor nor trailer bore an I.C.C. number or other indicia of its approval or sanction (Tr. 266). A witness said the truck appeared suitable only for hauling a light cargo of hay, perhaps to 25,000 pounds (Tr. 714). Another driver said Pacific Intermountain Express, a valid common carrier, would never make use of equipment alike that which carried appellant's steel rails on the trip to Seattle;

nor would such usage be permitted by the I.C.C. (Tr. 113).

Appellant's carrier's truck lived up to its appearance. Appellees proved it really was in poor mechanical condition. Witnesses testified it was unsafe to drive (Tr. 117, 200, 587, 777). At the accident scene the brakes were so badly worn and out of adjustment a pencil was easily inserted between the linings and drums with the brakes applied (Tr. 105-107, 684-685, 707-708). Later on a closer, detailed inspection revealed one brake on the tractor's drive axle had little braking power. The wear on the lining was into its rivets (Tr. 169). This claim is substantiated by Exhibit 23, a brake shoe brought to court (Tr. 181-183).

Mr. Gene McCoy, who salvaged the truck, said the brake shoes on both wheels of the tractor's tag axle were worse than Exhibit 23, and the brakes were far out of adjustment (Tr. 187-190).[5] Even proper adjustment, in his opinion, would have been futile because the brakes were too far gone (Tr. 188, 190, 200). Mr. McCoy also examined the forward axle of the trailer. He found one wheel had no brake lining, indicating it had no braking power whatsoever (Exs. 3A & 3B; Tr. 191-192). The other wheel was down to half of its brake lining (Tr. 191-192). As far as concerns the wheels on the rear trailer, Mr. McCoy found their linings were completely shot (Tr. 198-200).

Both brake drums on the tractor's tag axle were

[5] A witness called by the defense, Mr. James Rogers of the Washington Public Service Commission, corroborated the view the truck's brakes were out of adjustment. (Tr. 708).

oversized, as were the drums on the rear axle of the trailer (Tr. 198-199). The significance of said defects is that the truck's brakes were satisfactory for light hay loads only, but not for heavier loads (Tr. 209, 239). One witness testified in effect it was a minor miracle the truck reached as far as Tacoma on its journey from California before having the accident (Tr. 138-139). All in all, the jury was justified in concluding the truck was unsafe in appearance and in actuality when utilized by appellant to carry its steel. (Tr. 133, 156, 164-214.)

There is also evidence in the record bearing on the incompetency of defendant Sim Knight, the truck driver. Witnesses said he should have known of the poor condition of his brakes (Tr. 133, 138-139, 164-200, 621-623, 709).[6] The driver admitted that during his journey to Washington he never checked his brakes except by visual observation (Tr. 394-396, 422). Defendant Sim Knight knew his trailer was for carrying hay or wood chip products only (Tr. 340-342, 441-442). He admitted an absence of information about his business, transportation under I.C.C. licensing rules and requirements (Tr. 342, 427-430). He was employed sight unseen by calling a certain telephone number. His only pay was an advance of $75 left for him at a Portland service station (Tr. 233, 339-340, 350-355, 358-362, 382-387, 428-433). And other evidence showed defendant Sim Knight to be wanting

[6] The record contains evidence that operators of trucks of I.C.C. authorized carriers are trained to be constantly alert to the condition of their brakes (Tr. 554-566).

in knowledge as to proper truck driving, such as the correct starting gear for descent of a hill marked with a sign warning truckers of a steep grade (Tr. 119-367-368, 373-375, 423-425, 573, 716-717).

Witnesses expert in interstate commerce carrier matters testified that unlicensed, unauthorized carriers have marginal or unprofitable operations on account of their low, business procuring rates, and consequently soon quit (Tr. 269-270, 275, 648-657). Defendant Transport Supply Company proved no exception to the rule. The earliest record indication of its existence is approximately November 23, 1963, when employed by appellant at an unlawful, cut-rate to haul steel products to Portland from Los Angeles (Ex. 6A; Tr. 20, 277). Shortly after December 9, 1963, the date of appellees' accident, defendant Transport Supply Company cancelled its telephone and suspended its activities (Exs. 6C, 6D; Tr. 382-383). Defendant Transport Supply Company never did have a business address, operating out of Post Office box. It never was listed in the Portland telephone directory. Long-time employees of regular, legitimate carriers never heard of defendant Transport Supply Company until this action was started (Ex. 6D, Tr. 338-340, 382-383, 432-433, 449).[7]

Appellant engages in extensive interstate and intrastate shipments of its steel products, some 400 per month (Ex. 7; Tr. 452, 611). In view of appellant's experience and the general knowledge of steel ship-

[7] There are only 16-18 specialty carriers and a few general commodity carriers on the west coast authorized to haul steel rails and bars interstate (Tr. 290).

pers, the jury had sufficient evidence to decide appellant knew defendant Transport Supply Company was wholly incompetent to carry appellant's steel in interstate commerce (Tr. 271-275, 648-651). Additionally, the tractor-trailer in question was actually loaded under the supervision of appellant's employees. Whatever the relationship of defendant Transport Supply Company and defendant Sim Knight,[8] appellant saw and used the obviously unsafe hay truck. (R. 112-114; Tr. 446-448.)

SUMMARY OF ARGUMENT

This is a fact appeal and the jury has resolved the facts in favor of appellees (R. 176-181). Appellant is liable because it was negligent in hiring defendant Transport Supply Company to carry appellant's steel goods, and that negligence proximately caused appellees' damages. Further, appellant is liable, as the jury held, with ample record support, be cause appellant willfully or wantonly violated the interstate commerce act, to appellees' detriment.

The issues argued by appellant are fictitious or erroneous. No one claims a principal is liable for his independent contractor's negligence (App. Br. 30-33). Appellees do contend, however, appellant is liable on its own negligent selection of an independent contractor. Appellees also contend Congress enacted 49 U.S. C.A. § 322(c) to protect or otherwise benefit the public, and appellant is wrong in its argument to the contrary. (App. Br. 50-66.)

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[8] Defendant Sim Knight testified he was an employee of defendant Transport Supply Company (Tr. 430).

ARGUMENT IN SUPPORT OF JUDGMENT

A. Appellant Negligently Utilized an Incompetent Carrier

The Restatement of Torts, 2d Ed., § 411, p. 376, declares appellant's duty at the time it shipped the load of steel rails and bars in the following language:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) To do work which will involve a risk of physical harm unless it is skillfully or carefully done, or
>
> (b) To perform any duty which the employer owes to third persons.

The American Law Institute's comment on that section reads (pp. 376-377):

> The words "competent and careful contractor" denote a contractor who possesses the knowledge, skill, experience and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others, and who also possesses the personal characteristics which are equally necessary.

There are cases that hold motor carrier freight transportation involves considerable highway danger. *Eli v. Murphy* (Cal.), 248 P. 2d 756 (1952); *Venuto v. Robinson* (C.A. 3), 118 F. 2d 679, 682-683 (1941); *Berry v. Keeler* (Mass.), 76 NE 2d 158, 164 (1947); *Hodges v. Johnson* (D.C., Va.), 52 F. Supp. 488, 490 (1943); and *Lewis v. Younger* (Ill.), 138 NE 2d 696 (1956). See, too, *N.L.R.B. v. U.S. Truck Co., Inc.* (C.A.6), 124 F.

2d 887 (1942). Obviously highway users are especially endangered whenever huge tractor-trailers, fully loaded with steel, have unsafe equipment, inadequate brakes or incompetent drivers.

The Restatement of Torts, 2d Ed. § 411, page 376, 377, cites an example of liability on all fours with the case at bar:

> The A Company, engaged in logging operations, hires B Company to haul large logs over the public highway. With the exercise of reasonable care in making inquiry A Company could, but does not, discover that B Company's only available equipment consists of converted lumber trucks unsuitable for hauling such large logs in safety and on which the logs cannot be securely fastened. While such a truck of B Company is hauling the logs, they displaced while rounding a curve, and one of them falls upon the passing automobile of C, injuring C. A Company is subject to liability to C.

The law of the state of Washington, which the trial judge followed, has long recognized liability predicated upon the failure of a principal to use care in employing an independent contractor to do work dangerous unless carefully performed. *Richardson v. Carbon Hill Coal Co.* (Wash.), 32 P. 1012 (1893); *Green v. Western America Co.* (Wash.), 70 P. 310 (1902). The text writers cite the former case as indicating Washington's adherence to the majority rule of liability for negligent selection of an independent contractor. Prosser on Torts, 3rd Ed. § 70, pp. 480-481; Annotation, 30 ALR 1502, pp. 1438-1540. For other Washington cases recognizing instances of liability for work of independent contractors, see *H. W. Van Slyke*

Warehouse Co. v. Vilter Manufacturing Co. (Wash.), 291 P. 1103 (1930); *Amann v. Tacoma* (Wash.), 16 P. 2d 601 (1932); and *Blancher v. The Bank of California* (Wash.), 286 P. 2d 92 (1955).

The rule of liability for negligent selection of an independent contractor is almost universally followed. *Evans v. Allstate* (La.), 194 So. 2d 762 (1967); *Eitel v. Times, Inc.* (Ore.), 352 P. 2d 485 (1960); *Mooney v. Stainless, Inc.* (C.A.6), 338 F. 2d 127 (1964); *Berquist v. Penterman* (N.Y.), 134 A. 2d 20 (1957); *Matanuska Electric Assoc. v. Johnson* (Alaska), 386 P. 2d 698 (1963); *Skidmore v. Haggard* (Mo.), 110 SW 2d 726 (1937); *Carr v. Merrimack Farmers Exchange, Inc.* (N.H.), 146 A. 2d 276 (1958); *Ozan Lumber Company v. McNeely* (Ark.), 217 S.W. 2d 341 (1949); *Joslin v. Idaho Times Publishing Co.* (Ida.), 91 P. 2d 386 (1939); Annotation, 8 ALR 2d 267; 27 Am. Jur., Independent Contractors, § 28, p. 507; 2 Harper & James on Torts, § 26.11, p. 1395, 1405; 57 C.J.S., Master & Servant, § 592, p. 368; Shearman & Redfield on Negligence, Rev. Ed., Vol. 1, § 174, p. 411. Many supporting cases go to the precise question we have here: that is, *Risley v. Lenwell* (Cal.), 277 P. 2d 897 (1954) involves the negligent selection of a logging truck operator with defective equipment; *Carr v. Merrimack Farmers Exchange, Inc.* (N.H.), 146 A. 2d 276 (1958), involves the negligent engagement of a hay truck which was precariously loaded; *Ozan Lumber v. McNeely* (Ark.), 217 S.W. 2d 341 (1949), deals with the negligent retention of a log truck driver who was reckless; *Ellis & Lewis v.*

Warner (Ark.), 20 S.W. 2d 320 (1929), involves the careless keeping of a young and inexperienced gravel truck operator; and *Joslin v. Idaho Times Publishing Company* (Ida.), 91 P. 2d 386 (1939), concerns the negligent retention of a person to operate a vehicle to deliver papers.

Actual knowledge of incompetency of the independent contractor, although proved in the case at bar, is not a requirement. See *Joslin v. Idaho Times Publishing Company* (Ida.), 91 P. 2d 386 (1939), where the court holds it is a duty upon the principal to inquire into the competency of his independent contractor. Accord: *Carr v. Merrimack Farmers Exchange, Inc.* (N.H.), 146 A. 2d 276 (1958).

Without question defendant Sim Knight's truck involved a risk to appellees and others the whole of the journey to Tacoma from California. Without question the jury properly concluded appellant was negligent in hiring defendant Transport Supply Company, an unqualified carrier, and in utilizing the incompetent defendant Sim Knight's unsafe rig to haul appellant's steel. Without question the jury correctly decided proximate cause against appellant; that had it exercised any care whatsoever and employed a legitimate, qualified carrier, the quality of that carrier's equipment and driver would have been such the accident would not have occurred. *Risley v. Lenwell* (Cal.), 277 P. 2d 897 (1954).

APPELLANT'S VIOLATIONS OF STATUTORY LAW HELPED CAUSE THE ACCIDENT

49 U.S.C.A. § 322(c) provides in pertinent part:

> Any person, whether carrier, shipper, consignee or broker, or any officer, employee, agent or representative thereof, who shall knowingly . . . . . solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this chapter, . . . or by any other means or device, shall knowingly and wilfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of . . . property subject to this chapter for less than the applicable rate, fare, or charge, or who shall knowingly and wilfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this chapter provided for motor carriers or brokers, shall be deemed guilty of a misdemeanor.

Appellant's violation of this statute is practically conceded (Ex. 12D; R. 114; Tr. 509, 536). Appellees contend violation of the statute constitutes negligence per se. To establish negligence per se, appellees showed they were within a class the statute was designed to protect, and the hazard created by appellant was one the statute was designed to guard against. *Currie v. Union Oil Co.* (Wash.), 307 P. 2d 1056 (1957).

An objective of the regulation by Congress of interstate carriers, through the I.C.C., is public safety. The preamble of the 1940 amendment to the Interstate Commerce Act provides:

> It is hereby declared to be the national transportation policy of the Congress . . . to promote safe . . . . service . . . in transportation and among the several carriers.[9]

In 49 U.S.C.A., § 304(a) 1, 2 and 3, the I.C.C. is charged with establishing "safety of operation." Although not the precise issue involved, *U.S. v. E.*

[9] 49 U.S.C.A. Historical Note, p. 9.

Brooke Matlack, Inc. (D.C. Md.), 149 F. Supp. 814, 820 (1957), recognizes the provisions of U.S.C.A. Title 49 as having "public safety objectives." It is manifest, then, that one of the purposes of Congressional regulation of interstate motor carriers is to guard against unnecessary traffic hazards, such as defendant Sim Knight's truck, to other users of the highway, including appellees.

Washington follows the rule that violation of a statute or ordinance requiring a license to operate a motor vehicle is negligence per se, but such negligence must be a casual factor in the injury in order to be a basis of recovery to the injured. Thus, generally, that one without a driver's license becomes involved in an auto accident does not render him liable, the want of a license not being a proximate cause. *Switzer v. Sherwood* (Wash.), 141 Pac. 181 (1914); *Weihs v. Watson* (Wash.), 203 P. 2d 350 (1949).

But the supreme court of Washington further recognizes that driving in violation of a licensing statute may be a proximate cause of injury. In *White v. Peters* (Wash.), 329 P. 2d 471 (1958), one of the plaintiffs, an amputee, drove a car contrary to his restricted driver's license, which required that any car he operated be equipped with a hand throttle. The court held that whether he was contributorily negligent was a jury question. At 329 P. 2d 471, 474 appears:

> Plaintiff White's noncompliance with the requirements of his restricted driver's license may or may not have been a factor contributing to the accident. Whether his noncompliance is a proxi-

> mate cause of the accident is a jury question in the circumstances of this case.

Thus, the critical question seems to be whether there is a reasonably direct relationship between the violation of a licensing provision and the accident.

Here at bar the relationship lies in appellant's use of a woefully unsafe truck of an unauthorized cut-rate interstate carrier. The provision of Title 49 of U.S. C.A., and the I.C.C. regulations pursuant thereto, comprise a whole complex of requirements for maintenance and inspection of motor carriers to insure their movement in interstate commerce with safety (Tr. 648-666; Tr. 880-882). The law provides for minimum tariffs to render certain, among other things, a sufficient return that interstate motor carrier equipment can be adequately and safely maintained and operated. When appellant, as the shipper, and defendant Transport Supply Company, as the carrier, entered into the arrangement for the low cost and unlicensed interstate movement of appellant's steel products, the result was foreseeable if not inevitable. The jury was well within its province in finding appellant's shipment via an unlicensed carrier at a cut-rate charge, a statutory violation, aided and abetted the use of an unqualified driver or substandard equipment, proximately resulting in injury to appellees. As previously discussed, it is the same as in *White v. Peters* (Wash.), 329 P. 2d 471 (1958), where the jury was permitted to find the driving of a standard automobile by an amputee without a license to do so was one of the causes of the accident.

ARGUMENT ANSWERING APPELLANT

I. Appellant Raises an Untimely Issue

A study of appellant's exceptions to instructions given and refused shows it neither requested the court to rule as a matter of law defendant Sim Knight was an independent contractor of defendant Transport Supply Company, nor submitted an appropriate jury instruction to that effect (Tr. 913-921). Appellant's present theory that defendant Sim Knight was not an employee of defendant Transport Supply Company was not mentioned to the trial court.[10] In fairness, and in law needing no citation, appellant's argument cannot be considered at this late date.

Regardless, appellant's factual background for its new argument is faulty. The record is replete with evidence indicating defendant Sim Knight was an employee of defendant Transport Supply Company. [11] Nor is the legal status of defendant Sim Knight at the time of the accident of real consequence. Defendant Transport Supply Company was attempting to carry on the function of a franchised carrier author-

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[10] Appellant's Brief, pp. 30-33. An instruction was proposed (and the court gave one) to the effect that defendant Sim Knight was an independent contractor in his relationship to appellant. (Tr. 890, 919-920), but that would have no bearing on whether he was defendant Transport Supply Company's employee or independent contractor.

[11] For instance, defendant Transport Supply Company sent defendant Sim Knight to Sacramento (Tr. 338). He was instructed to call home before the return trip (Tr. 353). He did telephone and was directed to go to San Leandro (Tr. 355-356). Following the accident defendant Sim Knight called defendant Transport Supply Company for instructions (Tr. 428-429). He thought he was using defendant Transport Supply Company's license (Tr. 428-429, 441). Perhaps most important, defendant Sim Knight considered himself an employee of defendant Transport Supply Company, and so informed the federal government (Tr. 429-430).

ized to operate in interstate commerce by the I.C.C. (Tr. 701). A franchised carrier may not delegate its duties to an independent contractor and escape liability for the latter's negligence.[12] Thus in *Eli v. Murphy* (Cal.), 248 P. 2d 757, 758 (1952), the court said:

> C.M.T., operating as a highway common carrier, is engaged in a business attended with very considerable risk . . . . .
>
> The legislature has, however, classified highway common carriers, such as C.M.T. apart from others, and by so doing has indicated special concern with the safety of their operations . . .
>
> It is our conclusion that any trucking company, upon becoming a public utility under the Public Utility Act, should be expected to exhibit a high degree of performance in the field of safety and should expect to be required to observe rigid safety rules and regulations . . . . .
>
> In view of the more extensive and regular operations of highway common carriers as compared with others, the Legislature could reasonably conclude that the safety of their operations is of special importance and legislate accordingly. Highway common carriers may not, therefore, insulate themselves from liability for negligence occuring in the conduct of their business by engaging independent contractors to transport freight for them,

Appellees would further submit the legal status of defendant Sim Knight became moot when employees of appellant accepted defendant Sim Knight's truck by supervising the loading operation (R. 114; Tr. 445-446). Appellant therefore knew the type of equipment

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[12] Restatement of Torts, 2d Ed. § 428, p. 420.

being utilized to haul its steel to the state of Washington and also knew the equipment bore no I.C.C. numbers, which numbers would show the truck met I.C.C. safety regulations. The I.C.C. rules governing maintenance and safe operation of motor trucks were submitted to the jury (Tr. 880-882). Appellant's negligence, in part, is predicated upon that direct sanction of defendant Sim Knight and the use of his unsafe truck to haul appellant's goods.

II. Appellant Caught Red-Handed

Appellant states the law as imposing

> . . . liability on the employer for the harm proximately resulting from failure to select a competent independent contractor,

and argues for actual notice of prior incompetency. [13] Appellant ignores its illegal, rate-cutting contracts with defendant Transport Supply Company extending over the two weeks before the accident involving appellees (Exs. 6A, 6B; Tr. 19-23, 276-281). In that unregistered, "fly by night" motor carriers have but short lives (Tr. 649-651), notice of two weeks of defendant Transport Supply Company's lack of certification was more than ample and should foreclose the issue.[14]

Under appellant's theory a shipper can with im-

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[13] Appellant's brief, p. 34. Appellant only half states the law. See Annotation 8 ALR 2d 267.

[14] *Moore v. Roberts* (Tex.), 93 S.W. 2d (1936), cited by appellant (App. Br. 38) is inapplicable because no rate cutting concession was involved. *Mooney v. Stainless, Inc.* (C.A. 6), 338 F. 2d 127 (1964), not a commerce or trucking case, is of no assistance as there the proof of improper equipment was wanting. As the equipment of the inpendent contractor was satisfactory, advance notice would have availed nothing.

punity hire a newly activated illegal and unsafe carrier because of no prior history of accidents and/or incompetency (App. Br. 33-43). Adoption of such a rule would merely serve to license shippers and illegal carriers to flaunt the I.C.C. and its safety rules and regulations. Because defendant Transport Supply Company was unregulated and new, though having had several weeks of dealings with appellant, the court properly accepted testimony of experts to the effect that unlicensed carriers have faulty help and equipment, haul at illegal, rate-cutting rates and soon go out of business because of an accident or insolvency; that these characteristics are generally known to those engaged in interstate shipping (Tr. 640-666). The evidence shows beyond doubt that the haul of appellant's steel to Seattle was at a rate less than legal (R. 112-114; Tr. 509-510, 536), and appellant knew of activities of unlawful carriers (Tr. 536). The jury therefore had a right to total two and two at four; that is, that appellant knew or should have known defendant Transport Supply Company was without competency as to equipment or operator, or both.

III. Appellant Foiled by the Interstate Commerce Act

Appellant contends the I.C.C. has exclusive jurisdiction in the field of enforcement of federal law regulating interstate motor carriers (App. Br. 48). The proposition is unsupported by case law or common judgment. Obviously, the I.C.C. police force thereby needed to patrol the nation's highways would stagger the pocketbook of Congress. As with most criminal statutes, violation of 49 U.S.C.A. § 322(c) gives

rise to a civil action, as well as to government prosecution. A comparable analogy is the Public Accommodations Act of Washington, RCW 9.91.010. The supreme court of that state has held such law, while penal in form, is also remedial in nature and effect, giving the wronged party his right to sue for civil damages. *Anderson v. Pantages Theatre Co.,* (Wash.), 194 P. 813 (1921); *Browning v. Slenderella Systems* (Wash.), 341 P. 2d 859 (1959).

The claim of appellant of ignorance about its carrier's illegal activities is somewhat hollow (App. Br. 54-57). Appellant commenced using defendant Transport Supply Company's cut-rate service November 23, 1963 (Ex. 6A), affording ample opportunity to inquire about the carrier prior to the December 7, 1963 shipment that injured appellees (Exs. 5A, 6C). However, it is clear from the evidence the lack of defendant Transport Supply Company's certification was of no concern to appellant (Tr. 442, 484, 487, 518-520, 536). Appellant's callous disregard for the I.C.C. and its rules and regulations imputes knowledge of the illegality of defendant Transport Supply Company. *U.S. v. Gunn* (D.C. Ark.), 97 Fed. Supp. 476 (1950). See also *U.S. v E. Brooke Matlack, Inc.,* (D.C. Md.), 149 F. Supp. 814 (1957); *Steere Truck Lines, Inc. v. U.S.* (C.A. 5), 330 F. 2d 719 (1964).

From the evidence the jury undoubtedly concluded appellant knew the I.C.C. never certified defendant Transport Supply Company. Regular interstate shippers hiring new, unknown carriers to haul their

goods always check them out (Tr. 273).[15] Appellant customarily uses Wigle and Larimore, a San Francisco freight rate bureau, which could well (and probably did) advise appellant about defendant Transport Supply Company (Tr. 490). A telephone call to the local I.C.C. office would develop the same information within two or three minutes (Tr. 659-660). There are only 18 carriers or so qualified to carry steel rails and bars in interstate commerce on the West Coast (Tr. 290). Considering appellant's 400 outbound shipments per month (Tr. 511) and the need for special trucking equipment for its steel products (Tr. 526-527), it takes little acumen to conclude that if appellant made no inquiry about the carrier, it is because appellant knew at the outset defendant Transport Supply Company was illegitimate.[16]

That appellant was innocent of seeking an unlawful

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[15] Jack L. Stewart of the Willamette Tariff Bureau testified:

Q. (Mr. Hulscher) Are you familiar with the practice in the shipping industry when shipper hire new and unknown motor carriers to haul their goods?

A. Yes, sir.

Q. And would you tell us what that practice is.

A. Well, quite often when a carrier is granted new interstate authority and is unknown to the shipping industry, we will receive for the first few months at least the man is in business, a number of calls from shippers inquiring as to the lawful authority that the man has and has been granted by the ICC and also as to what tariffs he may subscribe to. Now, we get these calls not only for Willamette Tariffs, we also maintain, as I previously stated, a large file of existing tariffs, quite often the shippers know that these tariffs are available in our office, and they will call us inquiring about a carrier even though he is not a party to Willamette Tariff (Tr. 273.)

[16] The jury was likewise entitled to consider the warning defendant Sim Knight imparted to appellant when he showed up with his old, broken down hay rig at appellant's San Leandro warehouse without I.C.C. identification or other markings (Ex. 12D; Tr. 266).

rate concession from its carrier also strains credulity. According to the evidence, steel shippers just don't forward their products in interstate commerce without knowing what rates they are paying. (Tr. 292-293.)[17] Appellant concedes its price for the steel goods included the motor freight rate to Seattle (Tr. 506). That rate should have been $1.00 per hundredweight, but appellant paid substantially less (R. 113; Tr. 509, 536), thus giving appellant an edge on competition in a new area it was entering, the Pacific Northwest (Tr. 504). The jury could only decide appellant knowingly obtained its unlawful rate on the shipment injuring appellees, for that is the history of each of the half dozen movements defendant Transport Supply Company made for appellant (Exs. 6A, 6B, 6C, 6D). Further, before the jury was the legal requirement that interstate freight invoices be billed and paid within seven days of a shipment. A shipper violating the law is subject to fine. (Tr. 279.) Appellant's November 23, 1963, shipment via defendant Transport Supply Company should have been paid by the 1st or 2nd of December, 1963. Appellant contends it was not invoiced for an additional two weeks. The jury could infer that by the time defendant Sim Knight arrived, appellant would have been inquiring into the circumstances of its carrier unless, of course,

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[17] Appellant wrongly claims the tariffs of lawful carrier are identical. Thus, the rates of members of Pacific Inland Tariff Bureau members, regular route regulated carriers are generally higher in tariffs of members of the Willamette Tariff Bureau, irregular route carriers. (Tr. 300-307.)

appellant already possessed that information.[18]

Appellant relies on several Oklahoma and Georgia cases, as well as upon the attitude of its employees, that once the goods are surrendered to a carrier, regardless of competency, the shipper is relieved of liability (App. Br. 49, 59-64; Tr. 537-538). In none of appellant's cases, however, did the court find the charge for the transportation was less than the lawful rate. The prohibition against rate-cutting is the essence of 49 U.S.C.A. § 322(c). Moreover, the ruling in *Marion Machine Foundry v. Duncan* (Okla.), 101 P. 2d 813 (1940); and *Barsh v. Mullins* (Okla.), 338 P. 2d 845 (1959), is predicated on law which, unlike the state of Washington, holds the negligent selection of an incompetent independent contractor is not ground for liability of the principal (the contractee). In *Marion Machine Foundry v. Duncan* (Okla.), 101 P. 2d 813 (1940) appears:

> In some jurisdictions there is an established rule to the effect that if one would avoid liability for the negligence of his independent contractor toward a third party he must exercise reasonable care in his selection of a person in this capacity . . . *But so far as we know this court has had no occasion to apply that rule.* (Emphasis supplied.)

DeBord v. Procter & Gamble (CA 5), 146 F. 2d (1944), applying Georgia law, cites as its controlling

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[18] Appellant seems to admit the invoice of defendant Transport Supply Company for the December 3, 1963, shipment (Ex. 6B) was delivered appellant four days later (App. Br. 50). Heedless of this notice, appellant continued to ship with defendant Transport Supply Company (Ex. 6D), thus seriously questioning appellant's contention it knew nothing before defendant Sim Knight's accident (App. Br. 50).

authority *Marion Machine Foundry v. Duncan* (Okla.), 101 P. 2d 813, 815 (1940).

If appellant is contending the law of Washington on liability for negligent selection of an independent contractor is the same as that of Oklahoma and Georgia, it is submitted such contention is patently wrong. The law of Washington has been otherwise since 1893. *Richardson v. Carbon Hill Coal Co.* (Wash.), 32 P. 1012 (1893); *Green v. Western American Company* (Wash.), 70 P. 310 (1902); and see *H. W. Van Slyke Warehouse Co. v. Vilter Mfg. Co.* (Wash.), 291 P. 1103 (1930). See also Prosser on Torts, 3rd Ed., §70, p. 480-481.

With respect to appellant's contention its violation of 49 U.S.C.A. § 322(c) was not the proximate cause of the accident (App. Br. 57-66), the case at bar is not akin to driving a car without a license. Admittedly the want of a driver's license, which is obtainable upon application, is not the proximate cause of any accident. But here at bar defendant Transport Supply Company and defendant Sim Knight did not qualify for I.C.C. certification; it was not available to either. Appellees do concede it is within the realm of possibility defendant Transport Supply Company, upon application and compliance with federal law and I.C.C. safety regulations, could have been certified. For certain, had defendant Transport Supply Company been properly licensed, there would have been good equipment and an adequate driver,[19] no need to

[19] The trial court instructed the jury in effect that the I.C.C. required safe tractor-trailers with good and adequately maintained brakes and competent drivers (Tr. 880-882).

cut rates and no accident. Hence, the jury rightly found appellant's violation of 49 U.S.C.A. § 322(c) aided in putting defendant Transport Supply Company's unsafe trucking equipment on the highway, to the severe detriment of appellees.

IV. Claimed Trial Errors Are Picayune

The court below did not require the jury to find appellant had actual knowledge of its violation of 49 U.S.C.A. § 322(c). The court instructed the jury it sufficed to establish negligence if appellant should have so known (Tr. 893-894). A case in point is *U.S. v. Gunn* (D.C., Ark.), 97 F. Supp. 476 (1950). There defendant Gunn had motor trucks he "leased" to defendant Ozark Packing Co., but defendant Gunn hired and controlled the drivers. Defendant Ozark Packing Co. paid a lesser rate than charged by carriers with I.C.C. permits. Defendant Gunn was not licensed, but there was no evidence that fact was known to defendant Ozark Packing Co. Upon an indictment being filed, defendant Gunn pleaded *nolo contendere.* The question was whether defendant Ozark Packing Co. was guilty of violating 49 U.S.C.A. §§ 309(a) and 322(a). The evidence further disclosed defendant Ozark Packing Co. was primarily interested in having its goods transported at a rate cheaper than it would pay a valid carrier. In finding against defendant Ozark Packing Co., the court said (97 F. Supp. 476-480):

> The defendant, Ozark Packing Co. is presumed to have a practical knowledge of the law commensurate with its duties, the non-discharge of which

> may constitute an offense. A sane person who commits a wrong is bound to know that the wrong is subject to penal consequences. If the wrong is malum prohibitum, it should be known by the person for it is his duty to know what the law prohibits. Otherwise, no statute of this nature could be enforced. . . .
>
> There is no doubt that the defendant, Ozark Packing Co., intended to do what it did do. It knowingly entered into the arrangement with the defendant, Clifford C. Gunn, and to permit the defendant to escape punishment would be against the policy of the law, and the law treats such a defendant as if he were cognizant of the effects of which he did. Accepting the testimony of Mr. Kimbrough, the president and manager of the defendant corporation, to the effect that he was not advised of the status of his co-defendant, Clifford C. Gunn, yet this is not an excuse, because his ignorance is the result, to say the least, of negligence on his part and, since the act committed is made an offense irrespective of his intention at the time, then his ignorance that the act would constitute an offense is no defense. *The defendant corporation should have known the facts and, even though it may not have known all the facts, yet it is charged with the facts and its failure to know the facts is not a defense.* (Emphasis supplied.)

It is also submitted there is a difference between a shipper who simply engages a carrier who has no I.C.C. certificate, as in the cases cited by appellant, and a shipper, as at bar, who not only engages such a carrier but also pays a rate less than that allowed to authorized carriers. The combined offenses, when committed with actual or constructive knowledge, vi-

olate 49 U.S.C.A. § 322(c), and that is all the jury below was advised (Tr. 893-894).

Nor is appellant's complaint on the admission of testimony about the reputation of illegal carriers well taken (App. Br. 69-72). Mr. Felix Baker, appellant's salesman who placed the order shipping the mine rails and bars with defendant Transport Supply Company, was aware there were uncertified carriers and knew they constitute a law enforcement problem (Tr. 535-538). In that Mr. Frank E. Landsburg, the former I.C.C. regional manager, merely confirmed (albeit with elaboration) the previous testimony of Mr. Baker, there can be no error (Tr. 640-666).

Appellee offered the testimony of Mr. Landsburg, and that of Messrs. Conner of Pacific Inland Tariff Bureau (Tr. 10-50) and Jack T. Stewart of the Willamette Traffic Bureau (Tr. 267-323), to show that among those engaged in heavy interstate shipping, illegal carriers were reputed to exist, carriers which charged cut rates and utilized unsafe equipment and incompetent drivers. The testimony was not offered to prove defendant Transport Supply Company was an illegal carrier charging unlawful rates and operating substandard equipment. These facts were proved by direct testimony, exhibits and other evidence. That the trial court properly admitted the common knowledge testimony as an exception to the hearsay rule, to show appellant was on notice, see McCormick's Handbook of the Law of Evidence, 1954 Ed. § 299, p. 624:

> The existence of a reputation, or general manifestation of belief of a large group of people as to

> a particular fact, may be material, apart from the correctness of the belief. This is true, for example, when reputation that a fact exists is offered not to show the fact but to show that someone in the range of the reputation probably had knowledge of the reputed fact.

The remaining errors assigned by appellant pertain to relatively minor points and, even if well taken, would not warrant another lengthy trial where the result would be the same. The testimony about appellant's many rate concessions from defendant Transport Supply Company was not repetitive (App. Br. 72). Appellees had to prove appellant's violations of 49 U.S.C.A. § 322(c), which deals with rate-cutting, to substantiate one of their theories of appellant's liability. The trial court's charge on proximate cause, only a small part of which does appellant quote (App. Br. 74-75), is in accord with the law of Washington. The jury was told that one chargeable with negligence is liable for an injury which was reasonably foreseeable in the exercise of care (Tr. 875). But even if appellant was negligent, any independent negligence of defendant Sim Knight not foreseeable, would relieve appellant of liability (Tr. 876-877). That is all appellant's citation *Mehrer v. Easterling* (Wash.), 426 P. 2d 843 (1967), requires.

CONCLUSION

In the main appellant's argument is based on its version of the facts.[20] The jury, however, decided factual questions in favor of appellees (R. 176-181).

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[20] Appellant's facts are not even complete. See and compare appellee's corrected appendix of all exhibits at the end of this brief.

It is submitted the verdict and judgment below should be sustained if this court finds appellees proved, as they did, appellant was negligent in hiring an independent contractor to do work involving the risk of physical harm to others unless carefully done. Only if the facts do not warrant the submission of that question to the jury will this court reach the second issue: did appellant's negligent violation of 49 U.S. C.A. § 322(c) proximately cause appellees' injuries? Here, too, the facts in evidence should impell this court to agree with the jury's decision.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

Gerald L. Hulscher,
Attorney for Appellees

Dated this 3rd day of June, 1968

APPENDIX

EXHIBIT INDEX

Number	*Admitted*
1	Not admitted
2A through F	87
3A-C, Incl.	193
4	667
5A, 5B	24 & 931
6A, 6B, 6C	932
6D	933
7	935
8A, 8B	935
9	rejected page 936
10	rejected page 938
11	rejected page 940
12A	rejected page 943
12B	admitted page 942
12C	942
12D	941
13	For Court 943
14	rejected page 943
15	162 & 946 for Court only
16	946 For the Court
17	667
18	rejected page 947
19A	739
19B	740
19C	742
19D	742
19E	743
19F	743
19G	713
19H	715
20	Not admitted
21	For the Court
22	761
23	173
24	177
25A, 25B	578